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No. 14-1143

IN THE

Supreme Court of the United States

CHADRIN LEE MULLENIX,
IN HIS INDIVIDUAL CAPACITY,

Petitioner,

v.

BEATRICE LUNA, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ISRAEL LEIJA, JR.; CHRISTINA MARIE FLORES, AS NEXT FRIEND OF J.L. AND J.L., MINOR CHILDREN,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Did the Fifth Circuit correctly conclude that there were triable issues of fact precluding summary judgment as to whether an officer in petitioner's position could reasonably have believed that the driver posed a threat justifying the use of deadly force?

(2) Did the Fifth Circuit correctly hold that triable issues of fact also precluded qualified immunity at this stage?

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STATEMENT OF THE CASE

A. Factual Background

On March 23, 2010, Texas Department of Public Safety Trooper Chadrin Lee Mullenix was called in by his supervisor, Sergeant Robert Byrd, for a performance review. CA5 Record On Appeal ("ROA") 730, 978. Byrd felt that Mullenix was failing to meet expectations and instructed him to be more "proactive" about making traffic stops. Pet. App. 6a; ROA 978-79.

Later that night, a sergeant with the Tulia Police Department saw Israel Leija, Jr. at a Sonic Drive-In and attempted to arrest him on a motion to revoke misdemeanor probation. Pet. App. 2a. The sergeant approached Leija, who was idling in his vehicle with the window open, and informed him that he was under arrest. ROA 558. Leija asked if he could first take his car home. *Id.* The sergeant said no but told him that his father could come pick up the car so that it would not be impounded. *Id.* Leija then "started backing out" around the sergeant's vehicle and drove toward Interstate 27. *Id.* The sergeant followed Leija and advised dispatch of the pursuit. *Id.* 559.

Once on the highway, another officer, Corporal Gabriel Rodriguez, became the primary officer following Leija. Pet. App. 2a; *see* ROA 798. Dispatch relayed that Leija had called and claimed that he would shoot at officers if they did not abandon the chase. Pet. App. 3a.

In response, officers from multiple agencies decided to set up spike systems at three locations on I-27. Pet. App. 3a. Law enforcement agencies across the country routinely use spike systems to disable

vehicles during high-speed chases.[1] A spike system is a long strip of hollow needles that puncture and gradually deflate the tires of any car that drives over them. Chris Rickert, *How Do Police Road Spikes Work?*, Wis. State J. (Mar. 17, 2010, 2:00 PM).[2] To set up spikes, an officer pulls the strip across the roadway and then takes cover. *Id.* From cover, the officer pulls on a cord to raise the spikes into position, and then – once the fleeing motorist has driven over the spikes – pulls again to yank the spikes out of the way of other traffic. *Id.* The officers involved in this case had been trained on spikes and had learned how to take protective positions after deployment. Pet. App. 3a; *see also* ROA 739-40. They decided to set up three sets of spikes along a ten-mile stretch of I-27. *See* ROA 833-34. The first set would be deployed underneath the overpass at Cemetery Road. *See* Pet. App. 3a; *see also* ROA 737.

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[1] *See, e.g.*, N.Y. State Police, *Annual Report* 40 (2007), *available at* http://troopers.ny.gov/introduction/Annual_Reports/AnnualReport2007.pdf; Boston Police Dep't, *Rules and Procedures: Rule 301* § 7.6.10 (2013), *available at* http://bpdnews.com/rules-and-procedures; Seattle Police Dep't, *Manual* § 13.031 (Jan. 1, 2015), *available at* http://www.seattle.gov/police-manual/title-13---vehicle-operations/13031---vehicle-eludingpursuits; Denver Police Dep't, *Operations Manual* 204-9 (Apr. 30, 2015), *available at* http://www.denvergov.org/Portals/720/documents/OperationsManual/204.pdf; Baltimore Cty. Gov't, *Tire Deflation Device Training* (Feb. 26, 2015), http://www.baltimorecountymd.gov/Agencies/police/trainingsection/stopstickstraining.html.

[2] http://host.madison.com/news/local/footnote-how-do-police-road-spikes-work/article_8d768c50-3149-11df-a7b6-001cc4c002e0.html.

Meanwhile, Mullenix, who was working traffic enforcement thirty-two miles away, heard about the pursuit over his radio. ROA 734-35. He decided to join the effort. *Id.* 735.

Instead of deferring to the plan to use spikes, Mullenix radioed that he "might go to the bridge at Cemetery Road with a rifle and see what kind of shot [he] get[s]." ROA 871 (08.Radio.RSCO1). Mullenix said he wanted to shoot at the car's engine. Pet. 6. Yet he had no experience shooting at a moving vehicle or training in stopping a car with gunfire. Pet. App. 4a. His sole experience with shooting moving objects had been firing at clay pigeons with a shotgun. *Id.*

Arriving at the overpass, Mullenix asked over his radio whether attempting to shoot the car with his rifle was "worth doing." Pet. 6. Rodriguez then advised that Leija had slowed to 85 miles per hour. *Id.* Mullenix responded by asking dispatch to contact Sergeant Byrd "on the traffic [they] just heard and ask what he advises." ROA 869 at 9:55 ("Mullenix Dash Cam."). Without waiting for a response, Mullenix left his car. Pet. 6.

Forty seconds after Mullenix asked for Byrd's advice, dispatch conveyed Byrd's order to "stand by" and "wait and see if the spikes work." Mullenix Dash Cam. at 9:55-10:35. As the record stands now, there is a factual dispute about whether Mullenix heard the order. Pet. 6. Mullenix claims that he left the car immediately after asking his supervisor's advice, and that he never turned on his car's loudspeakers to hear the answer. *See id.* 6 n.2. But viewing the evidence in the light most favorable to respondents (as is necessary in the current procedural posture),

Mullenix heard the command – either from the radio in his car through his open trunk or from the radio of nearby officers – and then chose to disregard his sergeant's order. Pet. App. 5a, 28a-29a.

Mullenix waited on the bridge as three minutes passed. Pet. App. 4a. During that time, he observed no other cars on the interstate, and, indeed, understood this rural portion of I-27 to be "very, very lightly traveled." ROA 721. Nor did Mullenix see any pedestrians, businesses, or residences along the highway. Pet. App. 16a; *see also* ROA 719-21.

While waiting, Mullenix also had a "casual conversation" with a sheriff's deputy on the overpass. Pet. App. 5a. Mullenix asked, "What do you think, one shot right down on it?" Mullenix Dash Cam. at 11:06. The deputy replied, "You know we're going to have spikes ready." *Id.* at 11:09. By that time, Sergeant Troy Ducheneaux had set up the spikes below the overpass and had taken cover behind one of the bridge's pillars. ROA 740. Mullenix and the deputy discussed Ducheneaux's presence only in regard to whether Mullenix himself "would hit [Ducheneaux]; he did not indicate that he perceived a threat to Ducheneaux from Leija." Pet. App. 19a.

As Leija's car came into view, Mullenix saw the same thing that the other officers had been observing: Leija was driving straight down the highway. *See* ROA 867 (Rodriguez's Dash Camera). Leija drove without indicating that he was aware of Ducheneaux's presence or the spikes that lay ahead. *See id.* at 15:30-16:00. It is uncontested that Leija posed no threat to Mullenix. *See* ROA 745.

As Leija approached the overpass, but before he reached the spikes, Mullenix rapidly fired six rounds

down into Leija's car. Pet. App. 5a. "The evidence indicates that at least four of Mullenix's six shots struck Leija's upper body." *Id.* 6a. There is "no evidence" that Mullenix hit the vehicle's engine block. *Id.* Leija then lost control of the car, and it flipped numerous times before coming to a halt. Mullenix proclaimed, "That ought to do it." Mullenix Dash Cam. at 12:00.

Leija died from his bullet wounds. Officers did not find a weapon in his car. Meanwhile, referencing his earlier performance review, Mullenix quipped to Sergeant Byrd, "How's that for proactive?" Pet. App. 5a-6a.

A lieutenant with the DPS Office of the Inspector General (OIG) investigated the shooting. After several months, the OIG issued a report finding that in light of "the amount of time" Mullenix had to assess the situation, he acted "without due regard for the safety of [Ducheneaux] or Leija." ROA 865-66. The OIG concluded, therefore, that Mullenix's use of deadly force was "reckless" and "Not Justified." *Id.* at 866.[3]

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[3] In his deposition, the lieutenant who authored the report tried to back away from some of his earlier conclusions. ROA 942-45. Petitioner also has objected to the admissibility of the OIG report, claiming that it "was based on inadequate information, is not reliable, is not relevant, was not properly authenticated, and lacks foundation." *Id.* 904. The district court has not ruled on this scattershot objection, and the Fifth Circuit saw no need to consider the report, Pet. App. 24a n.3. But because summary judgment could not be granted against respondents without considering the report or declaring it inadmissible, respondents reference it in this brief.

B. Procedural History

1. Respondents Beatrice Luna, as the representative of Leija's estate, and Christina Flores, acting on behalf of Leija's seven- and nine-year-old children, brought excessive force claims against petitioner under 42 U.S.C. § 1983. *See* ROA 23-36.[4] Following discovery, petitioner moved for summary judgment, claiming qualified immunity. *Id.* 456.

The district court concluded that genuine issues of material fact precluded summary judgment. Pet. App. 37a. In particular, the court noted that further litigation was needed to determine whether, at the time of the shooting, Mullenix reasonably believed that Leija's actions presented an immediate threat to either officers or the public. *Id.*

2. The Fifth Circuit affirmed. Following this Court's lead in *Scott v. Harris*, 550 U.S. 372 (2007), the Fifth Circuit independently reviewed the video from the pursuit. Pet. App. 14a. The court of appeals concluded the footage comported with respondents' account of the chase. *Id.*

Viewing the totality of the evidence in the light most favorable to respondents, the Fifth Circuit concluded that none of the risk factors in *Scott* were present. Pet. App. 13a-14a. In particular, the court of appeals noted that Leija's driving had not posed a serious risk to any other drivers and that petitioner did not know where Ducheneaux was or indicate he

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[4] Respondents also brought federal and state claims against other defendants. ROA 23-36. These claims have all been withdrawn or dismissed. *See id.* 249, 451, 455, 982.

believed Ducheneaux faced any risk. *Id.* 18a-19a. Nor did Leija's claim about having a weapon pose a "sufficiently imminent" threat "at the moment of the shooting." *See id.* 18a. The court therefore held that the facts as thus far developed "do not establish that [petitioner] perceived an immediate threat at the time of the shooting, sufficient to justify the use of deadly force." *Id.* 19a-20a.

In light of the long-standing prohibition against using deadly force when suspects do not pose an imminent threat to others, the Fifth Circuit further concluded that petitioner was not entitled to summary judgment on qualified immunity grounds. Pet. App. 21a-24a.

Judge King dissented. She acknowledged that it was a "close case" whether Mullenix "violated clearly established Fourth Amendment law" and that holding he did could be seen as "a fair, responsible decision." Pet. App. 92a. But she concluded that Mullenix's actions were not objectively unreasonable. *Id.* 79a.

The Fifth Circuit denied Mullenix's petition for rehearing and rehearing en banc. Pet. App. 40a. In the process, the panel substituted its original opinion with one clarifying the standard of review. *Id.* 2a. Judges Jolly and King authored dissents from the denial of rehearing. *Id.* 40a, 51a.

REASONS FOR DENYING THE WRIT

This case involves the application of settled law to unsettled facts. Faced with a claim of an unconstitutional use of deadly force against a fleeing motorist, the Fifth Circuit identified and applied this Court's well-developed jurisprudence to an

indeterminate record. The court of appeals' fact-intensive analysis is sound, and it does not conflict with the law in any other court of appeals. Furthermore, in light of recent police shootings, many law enforcement agencies are rethinking their protocols on the use of deadly force. This Court should await these developments before considering the reasonableness of a response to any particular factual scenario.

I. The Fifth Circuit's Decision Is Consistent With This Court's Precedents.

A. The Fifth Circuit Correctly Held On The Current Record That Petitioner's Use Of Deadly Force Violated The Fourth Amendment.

This Court already has well-developed Fourth Amendment law concerning the use of deadly force during high-speed car chases, and the Fifth Circuit's jurisprudence on the subject comports with that guidance.

1. In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court made clear that "[i]t is not better that all felony suspects die than they escape." *Id.* at 11. Instead, courts confronted with deadly force claims must consider whether the "officer ha[d] probable cause to believe that the suspect pose[d] a threat of serious physical harm." *Id.* When a person fleeing from the police poses "no immediate threat to the officer and no threat to others," the use of deadly force violates the Fourth Amendment. *Id.*

This standard requires courts to "slosh [their] way through the factbound morass of 'reasonableness.'" *Scott v. Harris*, 550 U.S. 372, 383 (2007). In *Scott*,

for example, another case involving a car chase, the Court weighed "the risk of bodily harm that [the officer's] actions posed to [the suspect] in light of the threat to the public that [the officer] was trying to eliminate." *Id.* The Court reviewed a video shot from the officer's dashboard and noted that the motorist was "racing down narrow, two-lane roads," ran multiple red lights, and "force[d] cars traveling in both directions to their respective shoulders to avoid being hit." *Id.* at 379. Thus, the Court held the officer's use of deadly force was reasonable because the high-speed pursuit "posed a substantial and immediate risk of serious physical injury." *Id.* at 386.

Similarly, in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), a suspect "passed more than two dozen other vehicles, several of which were forced to alter course," *id.* at 2021, and "swerve[ed] through traffic at high speeds," *id.* at 2017 (citation and internal quotation marks omitted). The suspect also hit multiple police vehicles and accelerated into a police car while flush against its bumper. *Id.* at 2017, 2021. The Court held that the officer's use of deadly force was reasonable because it was "beyond serious dispute that [the suspect's] flight posed a grave public safety risk." *Id.* at 2022.

2. In this case and others, the Fifth Circuit has followed this Court's instruction that this legal framework turns on highly fact-intensive analysis. For example, in *Thompson v. Mercer*, 762 F.3d 433 (5th Cir. 2014) – issued five months before the decision below – the Fifth Circuit held that an officer who used deadly force to end a car chase did not violate the Fourth Amendment. *Id.* at 439. The court of appeals assessed "the threat to the public," *id.* at

438 (emphasis omitted) (quoting *Scott*, 550 U.S. at 383), including the "inherent danger of vehicular flight," *id.* at 439 (internal quotation mark omitted). The police there, as here, believed the suspect was armed and watched him exceed 100 miles per hour while driving down rural roads. *See id.* at 436. But the suspect had also stolen a car with the occupant still in it, drove the wrong way down the road, and forced other motorists to pull off. *Id.* at 436-39. Furthermore, the officer who used deadly force was the last one who could stop the suspect before he reached a town. *Id.* at 440.

In this case, by contrast, the Fifth Circuit's fact-specific inquiry revealed that, for purposes of summary judgment, petitioner did not have probable cause to believe Leija posed an imminent threat to the general public or officers. For starters, there were no pedestrians, businesses, or residences by the highway. Pet. App. 15a-16a; *see also* ROA 719-721. Nor – in contrast to *Scott* and *Plumhoff* – had Leija passed many other cars, much less run any off the road. Pet. App. 13a. Thus, numerous higher-ranking officers, including petitioner's direct supervisor, had settled on a plan to use spike systems. *See id.* 20a-21a. As the Fifth Circuit put it, "There is no evidence any other officer , hearing the same information [petitioner] heard, including the information regarding Leija's threats, decided that deadly force was necessary or warranted." *Id.* 20a. To the contrary, petitioner's superior ordered him to "stand by" and "wait and see if the spikes work." *Id.* 5a.

Viewing the facts in respondents' favor, petitioner intentionally disregarded that plan. Even though he had no training in shooting moving vehicles,

petitioner decided to try to disable Leija's car by firing six rounds at it just seconds before it was set to reach the spikes. *See* Pet. App. 4a. If the jury accepts this version of the facts, it could reasonably find – as the police department's own inspector general did – that the "risk of bodily harm" from shooting was unnecessarily high compared to "the threat to the public that [petitioner] was trying to eliminate," *Scott*, 550 U.S. at 383. *See also supra* at 5 (discussing OIG report).

Nothing about Officer Ducheneaux's presence at the scene alters this calculus. Petitioner claims that he "did not actually know Ducheneaux's position or what he was doing beneath the overpass." *See* Pet. 20 (citation and internal quotation marks omitted). But petitioner was not rushed. He had time to check on Ducheneaux's status, yet he discussed Ducheneaux's presence with the nearby deputy only in regard to whether "*he* would hit [Ducheneaux]; he did not indicate that he perceived a threat to Ducheneaux from Leija," Pet. App. 19a. Furthermore, the Fifth Circuit found that petitioner *did* know officers were trained to take protective positions after deploying spikes. *Id.* 19a; *see also* ROA 739-40. Petitioner also knew the overpass had concrete pillars that could be used for cover. ROA 740. Therefore, petitioner could believe Ducheneaux was exposed only if he assumed that the officer had disregarded his training. Under these circumstances, a jury could find that the threat to Ducheneaux was too attenuated "at the time of the shooting to justify deadly force," Pet. App. 20a.

Nor did the Fifth Circuit "minimize[]" Leija's threats to shoot police officers. *See* Pet. 18. It simply

refused to hold categorically that a threat *always* green-lights the use of deadly force, reasoning that "allegedly being armed and in a car fleeing are not, *by themselves*, sufficient" to enable the use of such force. Pet. App. 16a-17a (emphasis added). That being so, the Fifth Circuit properly turned to the "factual scenario here" and distinguished this case from others where it had held that officers who shot at "suspect[s] believed to be armed" did not violate the Fourth Amendment. *Id.* 17a.

3. In addition to attacking the Fifth Circuit's reasonableness analysis, petitioner accuses the Fifth Circuit of holding categorically that "the Fourth Amendment forbids an officer to use deadly force against a fleeing suspect unless and until alternative, non-deadly means have failed." Pet. 2. Not so. The Fifth Circuit simply considered the fact that alternative means were already in place as one among many factors that "undermin[ed] the asserted necessity for resorting to deadly force at that particular instant." Pet. App. 21a. It did not hold that deploying tire spikes or any other tactic is a necessary precondition to shooting at a fleeing vehicle.

Not even petitioner maintains that the availability of alternative means cannot be a *factor* in assessing reasonableness. Nor could he. In *Scott*, Justice Ginsburg made clear that "relevant considerations" under the Court's car-chase jurisprudence include whether there was a "safer way, given the time, place, and circumstances, to stop the fleeing vehicle." 550 U.S. at 386 (Ginsburg, J., concurring). Likewise, other courts of appeals have held that "the availability of alternative methods of

capturing or subduing a suspect may be a factor to consider" in the excessive force inquiry. *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005); *see also Retz v. Seaton*, 741 F.3d 913, 918 (8th Cir. 2014) ("Depending on the circumstances, the 'perspective' of a reasonable officer may include consideration of alternative courses of action available at the time force was used.").[5]

B. The Fifth Circuit's Refusal To Order Summary Judgment On Qualified Immunity Grounds Is Consistent With This Court's Precedent.

1. The Fifth Circuit enunciated and applied this Court's standard that, to defeat qualified immunity, the constitutional right at issue "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Pet. App. 21a (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (internal quotation mark omitted). As the Fifth Circuit also recognized, this inquiry revolves around whether the official had "'fair warning'" that the conduct at issue was unlawful. *Id.* 22a (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)). The Fifth Circuit followed this Court's instruction, putting the "focus . on whether the officer had fair notice" in the specific context of the case at hand that his

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[5] One of petitioner's amici suggests that petitioner's superiors might have underestimated the danger that tire spikes themselves presented. *See* Br. of Nat'l Ass'n of Police Orgs. 15-16. If petitioner wishes to argue that using spikes is comparably dangerous to firing a semiautomatic rifle down upon a car, he may try to prove that at trial.

conduct was unlawful. *Id.* 21a-22a (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)).

2. The Fifth Circuit held that at the time of the events here, it was "clearly established" that an officer violates the Fourth Amendment by "shooting a suspect fleeing in a motor vehicle" absent a "sufficient threat of harm to the officer or others." Pet. App. 22a-23a (quoting *Lytle v. Bexar Cty.*, 560 F.3d 404, 417-18 (5th Cir. 2009), *cert. denied*, 559 U.S. 1007 (2010)). Petitioner's attacks on this application of settled qualified-immunity principles to the particulars of this case do not warrant certiorari.

a. Long before the shooting here, this Court made clear that the use of deadly force is permissible only when the "officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). This Court had also applied this reasonableness test to fleeing motorists, measuring an officer's actions against whether the motorist "posed a substantial and immediate risk of serious physical injury to others." *Scott v. Harris*, 550 U.S. 372, 386 (2007); *see also id.* at 383-86.

Contrary to petitioner's argument, this rule was not too "general" to provide fair notice that petitioner's conduct would violate the Fourth Amendment. *See* Pet. 22-25. When "prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights," those decisions provided the requisite "fair warning," even when there are "notable factual distinctions" between prior case law and the case at hand. *Hope*, 536 U.S. at 740

(quoting *United States v. Lanier*, 520 U.S. 259, 269 (1997)).

That is the situation here. Viewing the evidence in the light most favorable to respondents, Leija did not, at the moment of the shooting, "pose[] a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11; *see supra* at 10-12. While *Garner* involved a suspect fleeing on foot instead of in a car, Leija's driving did not pose so much of a greater threat as to deprive petitioner of fair warning of the governing law: that deadly force is unreasonable when the suspect poses "no immediate threat," *Garner*, 471 U.S. at 11.

To be sure, this Court held in *Brosseau* that *Garner*'s test did not provide sufficient warning that shooting a suspect who was attempting to flee in a car was unlawful. 543 U.S. at 199. But this Court later made clear that plaintiffs in respondents' position could "defeat immunity" by showing that "the officer's conduct in [their] case was materially different from the conduct in *Brosseau*." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014). And unlike *Brosseau*, where the police confronted a "disturbed felon" who refused to respond to repeated warnings from an officer pointing a firearm in his face, the police never warned Leija that they would use deadly force. *See Brosseau*, 543 U.S. at 196, 200. Nor, in contrast to *Brosseau*, had Leija been involved in a fight immediately prior to the officer's arrival or physically struggled with a police officer over the keys to his getaway vehicle. *See id.* at 195-96. Nor was Leija in a crowded residential area or about to drive into a small car occupied by a three-year-old. *See id.* at 196.

At bottom, the level of particularity petitioner demands would amount to giving "one free shot" to every officer who was the first to use deadly force in any new permutation of facts. *Cf. Virginia v. Harris*, 558 U.S. 978, 981 (2009) (Roberts, C.J., dissenting from denial of writ of certiorari) ("The effect of the rule below will be to grant drunk drivers 'one free swerve' before they can legally be pulled over by the police."). Even when all other officers involved in a pursuit (as well a reviewing agency) realized in the new situation that using deadly force was "Not Justified," ROA 866, an officer would be able to insulate himself from trial based on ultimately insignificant factual distinctions. This is not the law.

b. Even if a reasonable officer in petitioner's shoes needed more fine-grained notice to know that firing at Leija's car would be unconstitutional, courts had held at the time of the events here that officers' conduct in analogous circumstances violated the Fourth Amendment. *See* Pet. App. 22a-23a. In *Lytle v. Bexar County*, 560 F.3d 404 (5th Cir. 2009), *cert. denied*, 559 U.S. 1007 (2010), an officer fired on a fleeing motorist who had already collided with one vehicle during the chase and was on bond for felony theft and unlawful possession of a firearm. *Id.* at 407-08. Even though the officer knew the suspect had a history with weapons and could continue the car chase, the Fifth Circuit held that his use of force violated clearly established law because "no one was in immediate danger." *Id.* at 416-17.

In holding that the officer acted unreasonably, *Lytle* stressed it was in line with a consensus among the courts of appeals. 560 F.3d at 415-16 (citing cases). For example, in *Kirby v. Duva*, 530 F.3d 475

(6th Cir. 2008), officers confronted a fleeing motorist whom the officers knew to be "a violent, paranoid individual" who owned numerous weapons and "opened the door to his home only with a pointed gun." *Id.* at 477. Yet, in *Kirby* – as with this case – the use of deadly force violated the potentially armed suspect's "clearly established" Fourth Amendment rights because there was no "*immediate* danger to anyone," *id.* at 483 (emphasis added).

Other courts prior to 2010 likewise had consistently denied qualified immunity in car chase cases because there was no immediate threat. *See, e.g., Cordova v. Aragon*, 569 F.3d 1183, 1190 (10th Cir. 2009) ("*Scott* did not declare open season on suspects fleeing in motor vehicles." (citation and internal quotation mark omitted)); *Adams v. Speers* 473 F.3d 989, 991 (9th Cir. 2007) (ninety-minute long car chase); *Vaughan v. Cox*, 343 F.3d 1323, 1326-27 (11th Cir. 2003) (85-mile-per-hour chase after colliding with a police cruiser). So too in other cases involving potentially armed suspects because the threats to police were not imminent. *See, e.g., Meadours v. Ermel*, 483 F.3d 417, 423 (5th Cir. 2007) (denying qualified immunity for officers who shot a mentally ill man who threatened officers with a sharp object); *O'Bert v. Vargo*, 331 F.3d 29, 33 (2d Cir. 2003) (same for officers who shot a suspect resisting arrest who had threatened to shoot them).

II. The Fifth Circuit's Decision Does Not Conflict With The Law In Any Other Court Of Appeals.

A. Fourth Amendment Violation

Like the Fifth Circuit, other circuits have held that officers may not use deadly force in the absence of an imminent threat – including in a case that this Court declined earlier this term to review. *See, e.g.*, *Gonzalez v. City of Anaheim*, 747 F.3d 789, 797 (9th Cir.) (en banc) (officer who shot driver of minivan violated Fourth Amendment when there was no immediate danger and alternative means were available), *cert. denied sub nom. Wyatt v. F.E.V.*, 135 S. Ct. 676 (2014); *Waterman v. Batton*, 393 F.3d 471, 482 (4th Cir. 2005) (officers were unjustified in continuing to shoot at a fleeing car after the car had driven past the officers and no longer posed a threat); *Cowan v. Breen*, 352 F.3d 756, 763 (2d Cir. 2003) (officer who shot at oncoming car violated Fourth Amendment because officer was not in car's path).

The law in the Eleventh, Sixth, First, and Eighth Circuits is not to the contrary. The cases that petitioner cites from those circuits reflect the fact-intensive nature of excessive force cases, not any disagreement about the law.

Eleventh Circuit: In the Eleventh Circuit, as in the Fifth Circuit, the use of deadly force against a fleeing motorist is justified only when the motorist poses an imminent threat. For example, in petitioner's cited case, *Long v. Slaton*, 508 F.3d 576 (11th Cir. 2007), the Eleventh Circuit held that an officer's decision to shoot at a person who was driving away in the officer's police cruiser was reasonable. *Id.* at 583. The court emphasized three key factors:

the driver was known to be mentally unstable and suffering from a "psychotic episode," *id.* at 578; the officer had warned the driver that he would use deadly force; and "fully equipped police cruiser[s]" pose a special danger compared to regular cars. *Id.* at 581-82. Because "the time to think [was] short," these facts – all absent here – established that the need for deadly force at that moment was particularly pressing. *Id.* at 583.[6]

On the other hand, the Eleventh Circuit – just like the Fifth Circuit – will find a Fourth Amendment violation when the fleeing motorist did not pose an imminent threat at the time deadly force was used. For example, in *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), which this Court distinguished in *Scott v. Harris*, 550 U.S. 372, 384 (2007), and *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2024 (2014), the Eleventh Circuit denied summary judgment to an officer who shot a fleeing truck. 343 F.3d at 1330. The truck was travelling at over 85 miles per hour, had evaded a "rolling roadblock," and collided with the back of a police cruiser. *Id.* at 1326-27. The court of appeals nonetheless held that the facts could show that the driver posed no threat to the officer or any other

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[6] Petitioner additionally relies on *Quiles v. City of Tampa Police Department*, 596 Fed. Appx. 816 (11th Cir. 2015). Pet. 30. This is an unpublished case that is not precedential in the Eleventh Circuit. *See* 11th Cir. R. 36-2 (2014). In any event, the suspect in *Quiles* – who was fleeing on foot – presented an imminent threat because he had just physically fought with a police officer and it appeared that he had stolen that officer's gun. *See* 596 Fed. Appx. at 819.

motorists when, without warning, the officer fired on the truck. *Id.* at 1330-31.

Sixth Circuit: The law in the Sixth Circuit is no different: deadly force is justified only when a motorist presents an imminent threat. That was the case in *Cass v. City of Dayton*, 770 F.3d 368 (6th Cir. 2014), which petitioner cites. There, the fleeing motorist had been blocked by police cars when an officer approached the car, drew his weapon, and ordered the driver to stop. *Id.* at 372. The driver instead accelerated toward and hit the officer, then hit a second officer, causing the second officer to accidentally discharge his weapon. *Id.* Hearing gunfire and believing that other officers were in danger, the first officer made a split-second decision to fire at the car. *Id.* at 372-73. Given this imminent threat, the Sixth Circuit held that the use of deadly force was reasonable. *Id.* at 376.

At the same time, the Sixth Circuit, like the Fifth Circuit, will find a Fourth Amendment violation when the threat is not imminent. In *Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011), for example, the court held that an officer may have violated the Fourth Amendment when he rammed his car into a fleeing motorcycle, killing the rider, because the facts could show that the rider "posed no immediate threat to anyone." *Id.* at 503; *see also Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005) (denying summary judgment for officer who fired at a suspect who was driving off in the officer's squad car because jury could find that the officer was no longer in the car's path).

First Circuit: Though the First Circuit has not addressed a case comparable to this one, there is no reason to think that it would come to a different

outcome if it did. Petitioner's cited case, *McGrath v. Tavares*, 757 F.3d 20 (1st Cir. 2014), involved an immediate threat: the fleeing motorist accelerated toward first the shooting officer and then his partner. *See id.* at 23. The driver did so after leading the officers on a high-speed chase through city streets, weaving erratically, and occasionally driving in the wrong direction. *Id.* at 22-23. In the split-second the officer had to act, the driver posed an "imminent threat" to the shooting officer's life and his partner's. *See id.* at 29.

Eighth Circuit: The Eighth Circuit also has not considered a case like this one, though again there is no reason to think it would disagree with the Fifth Circuit. Petitioner's cited cases, *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012), and *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), both stressed imminent threats not present here.

In *Loch*, which did not involve a car chase, the Eighth Circuit held that an officer was justified in using deadly force against a suspect the officer reasonably believed was reaching for a weapon. 689 F.3d at 964, 966. Deadly force was similarly justified in *Cole*, where the officer – after warning the driver that he would shoot – fired on a fleeing eighteen-wheeler. 993 F.2d at 1330-33. By the time of the shooting, the driver had clearly demonstrated his disregard for the safety of the police and others on the crowded interstate by forcing "more than one hundred cars" off the road, ramming into police cars, and evading other means of ending the chase. *Id.* at 1331.

B. Denial Of Qualified Immunity

Like the Fifth Circuit, several other circuits have denied qualified immunity at the summary judgment stage in circumstances similar to those here. *See supra* at 17 (collecting other such cases). As with petitioner's claimed Fourth Amendment split, his alleged qualified immunity split is founded on cases that are easily distinguishable as they involved more immediate and substantial threats to officers than the attenuated threat here.

D.C. Circuit: In *Fenwick v. Pudimott*, 778 F.3d 133 (D.C. Cir. 2015), the D.C. Circuit held that – in part because that court had no previous law on the subject – it was not clearly established as of 2007 that it was unreasonable to shoot a fleeing car that moments before had accelerated towards officers and had hit one of them. *Id.* at 137. The court indicated, however, that had the threat to the officers clearly passed by the moment of shooting, the shooting could have been unreasonable under the law at the time. *See id.* at 139-40. Were the D.C. Circuit to have considered the facts here, therefore, its decision likely would have been the same as the one below.

Tenth Circuit: Similarly, in *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009), the Tenth Circuit held that it was not clearly established as of 2006 that the officer could not shoot at a fleeing truck that posed a "substantial but not imminent" threat to the public. *Id.* at 1189, 1192. There, the driver had exhibited a clear disregard for others by driving off the road, driving down the wrong side of an interstate, running two red lights, and avoiding alternative means of ending the chase. *See id.* at 1186. However, at the moment of shooting, there

were no other motorists in the immediate vicinity, and it was disputed whether the shooting officer was in the truck's path. *Id.* at 1187. The Tenth Circuit reasoned that the case fell between *Scott v. Harris*, 550 U.S. 372 (2007), and *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), and therefore held that the lawfulness of the use of force had not been clearly established. *Cordova*, 569 F.3d at 1192-93. Presented with the facts of this case, which are closer to those in *Vaughan*, the Tenth Circuit in 2006 may well have held that the officer was not entitled to qualified immunity.

In any event, *Cordova* held that the officer's use of deadly force was unreasonable. 569 F.3d at 1195. As a result, as of June 2009 – nine months before the events in this case – the Tenth Circuit had established that the Fourth Amendment prohibits shooting at a fleeing vehicle that poses a substantial but not imminent threat. Thus, if it had been deciding this case, the Tenth Circuit would have come to the same conclusion as the Fifth Circuit.

III. This Case Is A Poor Vehicle For Providing Guidance On The Use Of Deadly Force During Car Chases.

This Court already has a well-developed body of case law concerning the use of deadly force. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985). Several of those cases specifically involve car chases, including one from just last term. *See Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Scott v. Harris*, 550 U.S. 372 (2007); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam). Given the anomalous facts of this case and the changing nature of police protocols, taking

another "slosh" through the doctrine of reasonableness at this time, *see Scott*, 550 U.S. at 383, would not provide helpful guidance to officers or lower courts in the mine-run of cases.

1. Anomalous facts. In the typical deadly force case, officers need to make decisions based on near-instantaneous assessments of the imminence of threats. *See, e.g., Plumhoff*, 134 S. Ct. at 2020; *Graham*, 490 U.S. at 396-97. Accordingly, this Court has long instructed that assessing the reasonableness of a challenged use of force "must embody allowance for the fact that police officers are often forced to make split-second judgments." *See Graham*, 490 U.S. at 396-97. And qualified immunity similarly protects such snap judgments, even if they later turn out to have been mistaken, because it is undesirable to require police officers to equivocate when delay "would gravely endanger their lives or the lives of others," *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967).

Here, however, the circumstances of petitioner's decision to use deadly force are highly unusual. Petitioner was eager to use his rifle even before getting to the overpass or observing any part of the pursuit himself. *Supra* at 3-4. Once there, petitioner had three minutes with a working radio to determine if the threat to Officer Ducheneaux actually justified deadly force. *Id.* Instead, he disobeyed a direct order from his commanding officer, ignored a plan others had put in place, and attempted a challenging rifle shot he had no training in executing. *Id.* Citing "the amount of time" that petitioner had before shooting, the OIG report concluded that "the evidence does not justify [petitioner's] actions." ROA 866.

There is little to be gained by reviewing petitioner's renegade actions.

2. Changing protocols. In light of recent high-profile police shootings – and the extensive publicity surrounding them – law enforcement agencies have been re-evaluating their protocols on the use of deadly force. *See, e.g.*, Pervaiz Shallwani et al., *Police Move to Revamp Tactics*, Wall St. J., Dec. 5, 2014, at A1. Among other things, agencies are reassessing some of the accepted rationales for using force at earlier stages of an engagement. Matt Apuzzo, *Police Rethink Long Tradition on Using Force*, N.Y. Times, May 5, 2015, at A1; Mitch Smith & Matt Apuzzo, *Police in Cleveland Accept Tough Standards on Force*, N.Y. Times, May 27, 2015, at A1 (describing new Cleveland police policy restricting use of force as a "model" for other departments). In rethinking how and when they use deadly force to engage with threats, agencies are adjusting their tactics and are generally moving towards de-escalation. Shallwani, *supra*.

Because of these trends, future police responses to situations like this one may be very different from the officers' actions here. And the resulting reasonableness analysis may differ as well. *See, e.g.*, *Garner*, 471 U.S. at 10-11 (giving "substantial" weight to police department policies concerning use of deadly force). This Court, therefore, should wait for a case that concerns police behavior resulting from this realignment – and more typical facts – to provide lasting guidance for law enforcement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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